No. 13893

United States Court of Appeals

FOR THE NINTH CIRCUIT.

CLAIR LAVERNE WHITE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF FOR APPELLANT

Appeal from the United States District Court for the Southern District of California, Central Division.

HAROLD SHIRE
208 South Beverly Drive
Beverly Hills, California

HAYDEN C. COVINGTON
124 Columbia Heights
Brooklyn 1, New York

Counsel for Appellant

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Cases Cited

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May It Please the Court:

What has been said in the reply brief for appellant in the companion case of *John Alan Tomlinson* v. *United States of America,* No. 13892, filed in this Court, will be referred to in this reply brief rather than to repeat the same information here.

I.

The appellee says, at page 9 of its brief, that a reading

of appellant's entire Selective Service file indicates that there was contradictory evidence disputing the claim for classification as a conscientious objector. Nowhere does the appellee point to one single part of the Selective Service file in support of such assertion. Unless and until appellee can support its statements by factual references the mere assertions should be rejected.

II.

It is stated by appellee, at pages 10-11 of its brief, that there is no evidence of arbitrary and capricious action on the part of the local board. The plain answer to this is that the I-A-O classification (in the face of undisputed evidence showing the registrant to be opposed to both combatant and noncombatant military service) is arbitrary and capricious *per se.* Without basis in fact it compromises the bona fide claim of White. In answer to appellee's argument see pages 21-27 of the main brief for appellant in the *Tomlinson* case, No. 13892.

III.

The appellee argues, at page 11 of its brief, that the denial of the full conscientious objector status is proper, that the act left the board to finally determine the classification. It is then argued that the adverse classification proves basis in fact for the denial of the claimed classification.

This is a conclusion based on an assumption. The argument is faulty. It does not hold water. It is true that the classification by the draft board is final but it is final only when it is supported by basis in fact. The mere fact that the draft board makes a determination is never any basis in fact. The basis in fact must be found outside the classification itself.

This argument of appellee reminds one of the excuse usually given by a child when called upon to answer why it has done a certain thing. The answer is "Because."

Why? "Just because." This is the same sort of answer the appellee makes. It has basis in fact "because," but the appellee does not say because of what fact. It merely says the appellant was properly classified because he was classified by the board. This type of argument is no argument at all.

IV.

Since appellant filed his main brief, new and additional cases have been handed down or cited in the reports, which are now available. These cases support the proposition made by appellant that the denial of the conscientious objector status is without basis in fact.—*United States* v. *Pekarski,* 207 F. 2d 930 (2d Cir. Oct. 23, 1953); *Schuman* v. *United States,* — F. 2d — (9th Cir. Dec. 21, 1953); *Jewell* v. *United States,* — F. 2d — (6th Cir. Dec. 22, 1953); *United States* v. *Hartman,* — F. 2d — (2d Cir. Jan. 8, 1954); *United States* v. *Benzing,* No. 5862-C, Western District of New York, January 15, 1954; *United States* v. *Lowman,* No. 6093-C, Western District of New York, January 15, 1954; *United States* v. *Loupe,* No. Cr. 249-52, District of New Jersey, July 17, 1953; *Taffs* v. *United States,* 208 F. 2d 329 (8th Cir. Dec. 7, 1953).

V.

The appellee takes the position, at page 12 of its brief, that the trial court committed no error when it refused to allow the use of the secret FBI investigative report at the trial. It was found to be material. The appellant demanded to be informed of the adverse evidence appearing in the file. The hearing officer told him there was no adverse information in the file. This by no means settled the question. See pages 34-35 of the appellant's main brief.

Since appellant filed his main brief, the following cases supporting the position of appellant under this point have been handed down. First, the case of *United States* v. *Evans,* decided by the District of Connecticut, is now

reported. It will be found at 115 F. Supp. 340. The following additional cases are available: *United States* v. *Stull,* Cr. No. 5634, Eastern District of Virginia, November 6, 1953; *United States* v. *Brussell,* No. 3650, District of Montana, November 30, 1953; *United States* v. *Parker* and *United States* v. *Broadhead,* Nos. 3651, 3654, District of Montana, December 2, 1953; *United States* v. *Stasevic,* No. C. 142-143, Southern District of New York, December 17, 1953.

CONCLUSION

It is submitted that the judgment of the court below should be reversed and the appellant ordered acquitted.

Respectfully,

Harold Shire

208 South Beverly Drive
Beverly Hills, California

Hayden C. Covington

124 Columbia Heights
Brooklyn 1, New York

Counsel for Appellant